



February 1, 2002

Ms. Ann Bright
Legal & Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2002-0521

Dear Ms. Bright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158049.

The Texas Department of Insurance (the "department") received several requests for prompt pay restitution reports filed with the department pursuant to the department's consent orders. You indicate that the department does not object to the release of the responsive information. However, you indicate that the requests may implicate the proprietary rights of several interested third parties, including (1) Alta Health & Life Insurance Company, Great-West Life & Annuity Insurance Company, and One Health Plan of Texas, Inc. (collectively referred to as "Great-West"); (2) Blue Cross & Blue Shield of Texas, Rio Grande HMO, Inc., Southwest Texas HMO, Inc., and Texas Gulf Coast HMO, Inc. (collectively referred to as "Blue Cross"); (3) CIGNA HealthCare of Texas and Connecticut General Life Insurance Company (collectively referred to as "CIGNA"); (4) Humana Health Plan of Texas, Inc., Humana Insurance Company, and Employers Health Insurance Company (collectively referred to as "Humana"); (5) UniCare Life & Health Insurance Company ("UniCare"); (6) Sierra Health and Life Insurance Company, Inc. and Texas Health Choice, L.C. (collectively referred to as "Health Choice"); and (7) United Healthcare Insurance Company and United Healthcare of Texas, Inc. (collectively referred to as "United"). Accordingly, you notified these third parties of the requests for information pursuant to section 552.305 of the Government Code. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). In turn, several of the interested third parties have submitted correspondence to our office contending that their information is excepted from public disclosure. We have also received arguments from two of the requestors. *See* Gov't Code § 552.304. We have considered all of the submitted arguments and reviewed the submitted information.

You indicate that some of the interested third parties, including CIGNA and United, do not object to the release of their information. Therefore, we assume that you have released the prompt pay restitution reports of these companies to the appropriate requestors. *See* Gov't Code §§ 552.021, .221, .301, .302.

Furthermore, as of the date of this letter, Humana has not submitted to this office any comments explaining why its requested prompt pay restitution report should not be released. Therefore, we have no basis to conclude that its report is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, the department must release Humana's prompt pay restitution report to the appropriate requestors.

Next, we address the third party arguments submitted to this office in support of withholding the requested information. Great-West and Blue Cross contend that their information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 excepts from disclosure information relating to pending litigation that involves a governmental body. Section 552.103 is designed to protect the litigation interests of a governmental body, not third parties. Open Records Decision No. 551 (1990). Because the department does not raise section 552.103, this section is not applicable to the requested reports. *Id.*; *see* Open Records Decision No. 663 (1999) (governmental body may waive section 552.103). Therefore, the requested reports may not be withheld under section 552.103.

Blue Cross also contends that its reports are excepted from disclosure under section 552.112 of the Government Code. Section 552.112 excepts from public disclosure "information contained in or relating to examination, operation, or condition reports prepared by or for an agency responsible for the regulation or supervision of financial institutions or securities, or both." Like section 552.103, section 552.112 is designed to protect the interests of a governmental body, not third parties. *See Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.--Austin 1999, pet. denied). Because the department does not raise section 552.112, this section also is not applicable to the requested reports. *Id.* Consequently, the requested reports may not be withheld under section 552.112.

Blue Cross and UniCare argue that their information is excepted from disclosure under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Blue Cross contends that its prompt pay restitution report is confidential under sections 36.159 and 38.001 of the Texas Insurance Code. Section 36.159 provides, in part:

(c) Specific information relating to a particular policy or claim is privileged and confidential while in the possession of an insurance company, organization, association, or other entity holding a certificate of authority from the department and may not be disclosed by the entity to another person, except as specifically provided by law.

Section 38.001 provides:

(b) The [Department of Insurance] may address a reasonable inquiry to an insurance company, agent, or holder of an authorization relating to:

(1) the person's business condition; or

(2) any matter connected with the person's transactions that the department considers necessary for the public good or for the proper discharge of the department's duties.

(c) A person receiving an inquiry under Subsection (b) shall respond to the inquiry in writing not later than the 10th day after the date the inquiry is received.

(d) A response made under this section that is otherwise privileged or confidential by law remains privileged or confidential until introduced into evidence at an administrative hearing or in a court.

Blue Cross contends that it made its prompt pay restitution report available to the department pursuant to section 38.001 and that the report is confidential under section 36.159(c).¹ Even if we assume that the report was provided to the department pursuant to section 38.001, we find that the report is not confidential under section 36.159(c) because the report does not contain "specific information relating to a particular policy or claim."

UniCare contends that its prompt pay restitution report is confidential under article 20A.17(b)(2) of the Insurance Code in conjunction with title 28, section 11.204(19) of the Texas Administrative Code. Article 20A.17(b)(2) provides:

A copy of any contract, agreement, or other arrangement between a health maintenance organization and a physician or provider shall be provided to the commissioner [of insurance] by the health maintenance organization on the

¹Blue Cross also argues that claims information it submitted to the department pursuant to a May 18, 2001 letter is confidential. However, this information is not implicated by the current requests. Therefore, we do not address whether it is confidential.

request of the commissioner. Such documentation provided to the commissioner under this subsection shall be deemed confidential and not subject to the open records law, Chapter 552, Government Code.

The department contends that the prompt pay restitution reports do not contain "information about compensation arrangements or contractual arrangements between a health carrier and a physician or provider." Based on the department's argument and our review of the submitted reports, we find that the prompt pay restitution reports are not copies of contracts, agreements, or other arrangements between health maintenance organizations and physicians or providers. Therefore, the reports are not confidential under article 20A.17(b)(2) and may not be withheld thereunder.

Health Choice also contends that its information is confidential. However, Health Choice does not cite to any specific confidentiality provision, nor are we aware of any, that makes its reports confidential. Consequently, Health Choice's reports may not be withheld under section 552.101 of the Government Code, either.

Finally, Great-West, Blue Cross, and UniCare contend that their reports are excepted from disclosure under section 552.110 of the Government Code. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990).

On the other hand, the commercial and financial information prong of section 552.110 requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); see Open Records Decision No. 661 (1999).

Great-West argues that its prompt pay restitution reports are a trade secret excepted under section 552.110(a). Although Great-West contends that it "views [its reports] as trade secrets under common law," it fails to adequately demonstrate why its information constitutes a trade secret. Furthermore, information that is subject to disclosure under the Public Information Act may not be withheld from the public simply because the party submitting it anticipates or requests confidentiality. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 676-78 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Consequently, we find that Great-West's prompt pay restitution reports are not excepted from disclosure under section 552.110 of the Government Code and must be released. See Gov't Code § 552.110(a), (b); Open Records Decision Nos. 552 at 5 (1990), 542 at 3 (1990).

Blue Cross contends that its prompt pay restitution report is excepted under both prongs of section 552.110. First, Blue Cross argues that the information included in its report is based on insurance policy benefits and coverages that are trade secrets. However, Blue Cross does not adequately demonstrate why the information in its report constitutes a trade secret. Blue Cross also contends that disclosure of the information in its report "would cause competitive harm to Blue Cross." However, Blue Cross does not make a specific factual demonstration

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); see also Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

that substantial competitive injury would result from disclosure of its information. Consequently, we find that Blue Cross has not met its burden under either section 552.110(a) or section 552.110(b), and therefore, the department must release its prompt pay restitution report. *See* Gov't Code § 552.110(a), (b); ORD Nos. 552 at 5, 542 at 3.

UniCare also argues that its prompt pay restitution report is excepted under both subsection (a) and (b) of section 552.110. Under subsection (a), UniCare indicates that the information in its report meets each of the six indicia of a trade secret. UniCare specifically argues that the report is valuable to its competitors because the report reveals penalty and rate information and the report could be used to disparage UniCare. Similarly, UniCare contends that its report is excepted under subsection (b) because the report would reveal UniCare's provider rate and claims cost information, which could be used by its competitors to undercut it. Upon review of the report, we find that it reveals aggregate information concerning the amounts of restitution UniCare paid to providers and physicians as a result of UniCare's failure to comply with the clean claims statutes and rules. UniCare does not explain, nor is it apparent, how specific rate, cost, and penalty information could be culled from its report by its competitors for competitive use against UniCare. Therefore, we find that UniCare has not adequately demonstrated that the information in its prompt pay restitution report constitutes "a process or device for continuous use in the operation of the business." Furthermore, we find that UniCare has not adequately demonstrated that the release of the information in its report would cause it substantial competitive injury. Consequently, UniCare's prompt pay restitution report is not excepted under either subsection (a) or (b) of section 552.110, and must be released. *See* Gov't Code § 552.110(a), (b); ORD Nos. 552 at 5, 542 at 3.

Finally, Health Choice also contends that its prompt pay restitution reports are proprietary information. However, Health Choice does not make any specific argument regarding why its information is proprietary. Consequently, we find that Health Choice's prompt pay restitution reports must be released. *See* Gov't Code § 552.110(a), (b); ORD Nos. 552 at 5, 542 at 3.

In conclusion, the department must release all of the responsive prompt pay restitution reports to the appropriate requestors.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

NEB/seg

Ref: ID# 158049

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